DELICATE BUT DERNIER:
A PERSPECTIVE ON JUDICIAL REVIEW IN VERMONT
Seventh Annual Vermont Judicial History Seminar
by Paul S. Gillies
St. Albans, June 28, 2001

Table of Contents

Introduction

It's the worst thing we can say about a proposal, the epithet we reserve for the most unacceptable propositions. It's more than wrong: it's *unconstitutional*, the opposite of the true way. Any public official or body can make a mistake, but violating the fundamental law is serious.

In this essay, the subject is the 50 cases between 1814 and 2000 in which the Court declared a statute unconstitutional and void for violating the Vermont or U.S. Constitutions. A full study of the Vermont Constitution would review all Vermont cases that use or analyze the constitutions, including those where the arguments against constitutionality fail to convince the Court, but the scope of this study is narrower than that. The target is the cases where the Court used the constitution to undo the acts of the Legislature. This is the judicial branch using the constitution to undo actions of the legislative branch.

The material that follows is a mixture of chronology and discussion. It is not intended to be analytical, but to put the list of cases in order, tracing the evolution of the idea of judicial review through 187 years of the court's experience.

Taking a look at the full scope of decisions, no one era has a monopoly of the numbers. Breaking the periods down somewhat arbitrarily, the early years 1814-1839 show the court exercising its authority 10 times. Then there is a 21-year hiatus in such decisions. From 1860 to 1871, there are six more. Between 1884 and 1913, there are 12. Then another space of 17 years. Between 1930 and 1949, there are five. Then a 14-year interruption. There is one in 1963, 1971,

1972, 1973 and 1977. The 1980s account for six cases, and since 1992 there have been six more. Twenty-two cases were decided in the nineteenth century, 26 in the twentieth. The list will continue to grow over time.

At the heart of the idea of judicial review is the recognition of the constitution as the fundamental law. Acts of the legislature that conflict with the fundamental law are not law. The Court will do whatever it can to avoid having to make this decision. If a statute can be read two ways, "one of which supports the purpose and gives it effect, and the other renders it unconstitutional and void, the former is to be adopted, even though the latter may be the more natural interpretation of the language used, for an act is never to be construed as unconstitutional if a reasonable construction can be placed upon it which will render it valid."[1]

Grave doubts are also needed about the constitutionality of a statute before the Court will act. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.[2]

It is capital punishment for a proposal that obtained the support of the House and the Senate, and the signature of the Governor,[3] and was otherwise believed to be law. If unconstitutional, it is not law.

Executing a statute is something the Court does with great care. There is even a code word for this, used throughout the cases. Justice John Marshall, writing in *Marbury v. Madison*, described judicial review as requiring a "peculiar delicacy."[4] Vermont Supreme Court Judge Asa Aikens, in *Bates v. Kimball* (1824), confessed it is "a delicate and invidious task for one department of the government to review the decision of another." His only comfort was "the cheering hope of a good reception" by the legislative branch.[5] Judge James Barrett, in *Atkins v. Town of Randolph* (1858) said it was no time for "timorous delicacy" when the constitution had been violated, and charged ahead with his decision.[6]

A constitution requires one branch to respect the other. As Judge Titus Hutchinson wrote in *Langdon v. Strong* (1829),

> The constitution is a law to the legislature as well as to us; and, should they inadvertently act in violation of this law, their doings must be void. The constitution is an expression of the will of the people by which their public servants must be bound. It is always to be presumed that the legislators will

[1] Central Vermont Ry., Inc. v. Campbell, 108 Vt. 510, 523, 192 A. 197, 111 A.L.R. 175; State v. Clement Nat. Bank, 84 Vt. 167, 200, 78 A. 944, Ann.Cas.1912D, 22; In re Allen, 82 Vt. 365, 377, 73 A. 1078, 26 L.R.A., N.S., 232..

[2] State v. Auclair, 110 Vt. 147, 156, 4 A.2d 107; Central Vermont Ry., Inc. v. Campbell, supra; State v. Clement Nat. Bank, supra.

[3] A bill may become law without the Governor's signature, if it presented to the Governor while the Legislature is in session, after five days (Sundays excepted). Vermont Constitution, Chapter II, Section 11 see *Hartness v. Black*, 95 Vt. 190 (1921).

[4] *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 2 L.Ed. 60 (1803).

[5] *Bates v. Kimball*, 2 D.Chip. 77 (1824).

[6] *Atkins v. Town of Randolph*, 31 Vt. 226 (1858).

> carefully obey this law. Hence we must not heedlessly or wantonly decide their acts void, nor do it in any case till they are clearly so; especially as their power has no other limits than those prescribed in the constitution, and those resulting from the nature and principles of right and wrong, which must stand as boundaries to the sphere of every legislative operation. It has been said by some that the legislators are the sole judges whether their acts are constitutional; and that their acts are an expression of their decision upon the question. If this were so, the remedy of the people against oppressive acts, when there might be such, would be very slow and uncertain; depending upon the increased wisdom and patriotism of the legislative body, or upon changes of its members by new elections.[7]

1. History of the Idea of Judicial Review.

Constitutions came before democracy. Solon, in the sixth century B.C., reformed the Athenian Constitution by substituting oligarchy for monarchy, making fitness for public office a matter of wealth, rather than birth. Cleisthenes, in 510 B.C., substituted democracy for oligarchy, enfranchising citizens and organizing the legislative branch by topography, rather than wealth. As soon as civilization created constitutions, actions were being called unconstitutional by those who opposed them. In some instances, unconstitutional acts were the subject of war, regicide, revolution or, in a more peaceful way, the declaration of a judicial body.

a. Early Sources. Writing in 355 B.C., Demosthenes explained that, "The Solonian Constitution provided elaborate checks against hasty legislation. . . . If the new law was approved by the court, it was still liable to indictment for a breach of the constitution, especially if the proposers had not complied with all the legal formalities."[8] Solon stressed that by the adoption of bad law the people are deprived of their right and the benefits of the whole constitution.[9]

Under the English system, as it developed, Parliament was omnipotent. There was no idea of its laws being declared unconstitutional, since the "constitution" was not a formal document, as in the United States or the states, but the accumulation of laws, principles, and rules established by Parliament over time.[10]

Early Vermonters claimed actions by New York were unconstitutional before Vermont adopted its constitution. In a letter from Ethan Allen, Seth Warner, Remember Baker, and Robert Cochran, dated at Bennington June 5, 1774, to Governor William Tryon of New York, making the Vermont case to the government that claimed that land, states, "[I]t is the unreasonable and unconstitutional *exercise* of [New York's jurisdiction], that is the present bone of contention. . . ." The signers state that they are not the rioters; it is those who come into "these parts to dispossess us" and "every violent act they have done to compass their designs, though ever so

[7] *Langdon v. Strong*, 2 Vt. 23 (1829).
[8] "Against Leptines," Demosthenes I, J.H. Vance, Trans., Loeb Classical Library, 498-499.
[9] *See id.* at 495.
[10] William Blackstone, *Commentaries on the Laws of England* (1765-1769, 1902 ed. George Chase), 15, fn

much under pretence of law, is, in reality a violation of law, and an insult on the constitution . . . ."[11] They were speaking of the British Constitution.

b. The Vermont Constitution. When the 1777 Constitution was adopted, it contained no separation of powers clause. The present Section 5 was added in 1786. It requires that the legislative, executive and judicial departments "shall be separate and distinct, so that neither exercise the powers properly belonging to the others." The Governor's veto and the pardon are checks on the legislative and judicial branches. The power to limit spending or rewrite law or refuse to consent to nominations or retentions is a legislative check on the executive and judicial branches. The sole check of the judiciary on the legislative and executive branches is the power of judicial review, a power that is not directly recited in the Vermont Constitution, but takes its force from Section 5.

After any government is created, there is bound to be a period of adjustment. The problem was, the Legislature wasn't sure of its limits. Judge George Powers, dissenting in *Sabre v. Rutland Railway* (1913), told the story this way:

> To a student of the history of the times . . . , it is not altogether surprising to find the Legislature, with some frequence, encroaching upon the domains of the other departments, especially that of the judiciary. It passed acts prohibiting the trial of cases involving title to land; prohibited trials predicated upon certain contracts; set itself up as a court of chancery; appointed a commission to decide disputes over titles and made its own decree conclusive; it granted new trials. . . . All this is not to be taken as an indication that the people lacked in appreciation of the importance of the provisions of the Constitution referred to or that they were indifferent to the limitations imposed by that document. But rather as a result of inexperience in governmental affairs, of impressions and prejudices acquired before they removed to this state, and the pressing necessities of the times.[12]

Section 5 was adopted to clarify the differences among the branches, but alone it was not enough. The Legislature continued these practices until 1831, in spite of judicial decisions declaring these same types of laws void and unconstitutional. The judicial decisions that followed sometimes reveal either ignorance of precedent or a willful resistance to the Court's decisions. Certainly, legislative drafting was not as professional as it is today.

A constitution must be used to be vital. It gets its greatest exercise in cases of judicial review. Vermont's history of judicial review has been conservative. In light of the tens of thousands of decision, that there are only 50 instances of statutory rescission through judicial review is no sign of abuse of this power.

c. The Debate on the U. S. Constitution. The idea that the judiciary might have a check on legislation was regarded with suspicion by some at the time the U.S. Constitution was being drafted in Philadelphia. In a letter to the *New York Journal*, dated January 31, 1788, the writer who called himself Brutus wrote,

---

[11] William Slade, Jr., *Vermont State Papers* (1823), 25, 28.
[12] *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 A. 693 (1913).

> [The Supreme Court] will give the sense of every article of the constitution that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they are authorised by the constitution to decide in the last resort.[13]

By March 20, 1788, Brutus was even more troubled: "I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible." British judges "in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution." He feared the Supreme Court's power will be superior to the legislature, and by its actions it would abolish all state governments.[14]

In May of that year, Alexander Hamilton published *Federalist* LXXVIII, under the pseudonym Publius, and explained that the judiciary is the weakest of the departments of power, as it has neither sword nor purse.[15] "A constitution is in fact, and must be, regarded by the judges as a fundamental law. If therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcileable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[16]

c. Pre-Marbury Sources. Judicial review in America is older than *Marbury v. Madison* (1803) the first use of judicial review by the United States Supreme Court. As early as 1787, a North Carolina court had declared a statute void for violating that state's constitution.[17] The act had attempted to eliminate the need for a jury trial in a contest over a deed. The judges of that early North Carolina Court explained their reasoning:

> That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all: that if the members of the General Assembly could do this, they might with equal authority, not only render themselves the Legislators of the State for life,

[13] Brutus, *Debate on the Constitution* II, 132.
[14] *See id.* at 372, 375, 376.
[15] *See id., Federalist LXXVIII*, at 468.
[16] *See id.* at 474.
[17] *Bayard v. Singleton*, 1 N.C. (Mart.) 5 (1787).

without any further election of the people, from thence transmit the dignity and authority of legislation down to their heirs male forever.

But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.[18]

Even the Vermont Supreme Court considered, although it did not accept, an argument on the unconstitutionality of retrospective legislation, in 1802.[19] In *Whttington v. Polk* (1802), Chief Judge Samuel Chase of the Maryland Supreme Court wrote,

It is the office and province of the Court to decide all questions of law which are judicially brought before them, according to the established mode of proceeding, and to determine whether an Act of the Legislature, which assumes the appearance of a law, and is clothed with the garb of authority, is made pursuant to the power vested by the Constitution in the Legislature; for if it is not the result or emanation of authority derived from the Constitution, it is not law, and cannot influence the judgment of the Court in the decision of the question before them.

The oath of a Judge is that he will do equal right and justice according to the law of this State, in every case in which he shall act as Judge. To do right and justice according to law, the Judge must determine what the law is, which necessarily involves in it the right of examining the Constitution, (which is the supreme or paramount law, and under which the Legislature derive the only authority they are invested with, of making laws,) and considering whether the Act passed is made pursuant to the Constitution, and that trust and authority which is delegated thereby to the legislative body.

The three great powers or departments of government are independent of each other, and the Legislature, as such, can claim no superiority or pre-eminence over the other two. The Legislature are the trustees of the people, and, as such, can only move within those lines which the Constitution has defined as the boundaries of their authority, and if they should incautiously, or unadvisedly transcend those limits, the Constitution has placed the judiciary as the barrier or

[18] *Id.*

[19] *Doe* ex dem. Forbes v. Smith, 1 Tyl. 38 (1801). The Court gave away little of its reasoning on the question. Although counsel had argued strenuously for a ruling that a special act was unconstitutional, because it was retrospective, Chief Judge Royall Tyler explained curtly, "It is contended by the appellant's counsel, that this act is unconstitutional. The Court have had several acts of this kind under consideration, and have ever considered them constitutional."

> safe-guard to resist the oppression, and redress the injuries which might accrue from such inadvertent, or unintentional infringements of the Constitution.[20]

d. Marbury v. Madison. "It is emphatically the province and the duty of the judicial department to say what the law is."[21] The line is still chilling to read. Justice John Marshall's biographer says the decision was not controversial at the time it was issued, and enjoyed the support of President Thomas Jefferson.[22]

Today, Marbury is a polestar, and certainly since its issuance in 1803 it has served to justify scores of difficult decisions. Oddly, it is missing from the canon of judicial review cases in this study. No Vermont Supreme Court judge or justice cited it before *Baker v. State* (1999). But it was there, like a foundation, for everything that came later. There are other ways of seeing its influence, principally in the words and arguments that echo through these cases. First, the necessary humility, which is signaled by the use of the word "delicacy" in the opening of the decision, but also by the firmness with which the Court accepts its responsibility for this most disagreeable duty. Many judges, writing such decision, begin with the question whether an act is law if it violates a constitution, and discuss the process as well as the reasoning that allows them to reach this conclusion. Marshall underscores the principle that every individual has a right to claim the protection of the laws and that every right must have a remedy, every injury its proper redress. That is the foundation of judicial review in Vermont, as guaranteed by Article 4 of the Vermont Constitution.

2. The Council of Censors.

The first to exercise judicial review in Vermont was the Council of Censors, although the Council's authority was limited to identifying bad statutes, and recommending their repeal. The Vermont Constitution until 1870 made it the Council's duty "to enquire whether the legislative and executive branches of government have performed their duty as guardians of the people; or assumed to themselves, or exercised, other or greater powers than they are entitled to by the constitution."[23]

During the 97 years of its existence, the Council took this duty seriously by objecting to 63 acts of legislation. The legislature, usually respectful of the constitutional advice but sometimes uncertain of whether it was bound by the Council's actions, amended or repealed 36 of these.[24] The acts repudiated by the legislature after the Council's objections included laws authorizing corporeal punishment (maiming or branding), requiring all taxpayers to support the first-established church in a town regardless of religious sympathies, and suspending trials of land titles.

---

[20] *Whttington v. Polk*, 1 H. & J. 236, 244-245 (1802).
[21] M*arbury v. Madison*, 1 Cranch 5 U.S. 137, 154 (1803).
[22] Jean Edward Smith, John Marshall: Defender of a Nation (1996), 324. Jefferson later came to hate the idea. In a letter to Judge Spencer Roane, September 9, 1819, Jefferson wrote, "The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please." Thomas Jefferson, *Writings* Merrill Peterson, ed., *Library of America* 1428.
[23] *Records of the Council of Censors*, ed. P. Gillies and D.G. Sanford (1991), 17.
[24] *See id.* at xi.

The one category of cases the General Assembly refused to abandon was private acts, in spite of the Council's objections or later even the Court's repeated declarations that such acts were not law. These were common in early legislatures. A man would petition the legislature for special relief—immunity from prosecution for debt, a new trial, a deed or some other special advantage. When the Supreme Court finally started to exercise judicial review, it cited the Council's concern about the practice.

As early as 1785, the First Council of Censors condemned the practice of "legislation for individuals." The legislature would hear the complaints of dissatisfied parties fresh from court and enact a law to relieve them, even when the laws attempted to undo what a court had done. Such laws "introduce confusion into the general system, and are afterwards discovered to be wholly unnecessary."[25]

Several judgments against Daniel Marsh were nullified by the legislation. Andrew Graham got his farm back, in spite of a court judgment divesting him of the property.[26] These acts, in the eyes of the 1785 Council, destroyed the powers assigned by the constitution to the judicial department and violated Article 13 (all suits over property require jury trials) and Section 22nd (legislature shall provide for juries).[27] The 1813 Council condemned an act directing the deed of Job and Theoda Wood to be given in evidence (1813) because it "tends to divest one individual of a private right and title, and to invest the same in another individual, by a sovereign act of the legislature."[28] In 1820, the Council objected to an act granting a new trial to Jireh Durkee (1815), stating that it violated Section 5 (separation of powers), an invasion by the legislature into the judiciary's business. Although the Council admitted that constitution does not define judicial powers, the Council referred "to the prior usage of this, and other countries, for the definition of these powers" in which granting new trials was a judicial act.[29] The 1827 Council objected to acts that exempted individuals from the operation of the general laws, and acknowledged the growing authority of the judiciary. "The Council are aware that the highest tribunals have pronounced these acts to be void, and they have reason to hope that this decisive interposition of the courts, will hereafter prevent their enactment."[30]

The decisive interposition of the court had begun. Some might think it took the Council of Censors to start the engine of judicial review.

3. The Cases

In ***Dupy qui tam v. Wickwire*** **(1814)**, the Court reviewed an act ordering a deposition to be read in a trial then underway.[31] Reuben Wickwire was accused on illegally transporting Jacob Morse, a pauper, into the Town of Readsborough (later Readsboro). His supporters petitioned the Legislature for an act to overrule the presiding judge on a question of evidence.

---

[25] *See id.* at 68-69.
[26] *See id.* at 31-32.
[27] *See id.* at 42.
[28] *See id.* at 208-209.
[29] *See id.* at 254-255.
[30] *See id.* at 317.
[31] *Dupy qui tam v. Wickwire*, 1 D. Chip. 237 (1814).

Chief Judge Nathaniel Chipman wrote the opinion for the court, concluding the act was judicial in nature, not legislative, and so violated Section 5 (separation of powers) of the Vermont Constitution. He also found it wanting because it was retrospective, more a legislative order than a law, and so a violation of the Vermont and U.S. Constitutions, although he did not specify which articles or sections were offended for this reason. By requiring a deposition to be read in court, the legislature had gone even further, in Chipman's view: "Even if the legislature should have specially provided, that the deponent, should be liable to all the pains and penalties of wilful and corrupt perjury, for false swearing; such ex post facto provision would have been void, as being against the constitution of this State, the constitution of the United States, and even against the laws of nature."

Precisely what section of the Vermont Constitution is offended when an act is considered retrospective is a tough question. In later cases, notably *Bates v. Kimball* and its progeny, the Court focused on Articles 4 (certain remedy) and 9 (right to be protected in enjoyment of life, liberty and property). Section 5 (separation of powers) is inevitably involved, although it is not always cited. The difficulty sits with the nature of constitutional analysis. Saying what the Court believes the constitution means is risky. There is so little to rely on. Sometimes saying something is unconstitutional, without explaining why, sufficed. Sometimes an article or section of the Constitution was given, sometimes only key words like "retrospective" or "not law."

Chipman wrote the decision of ***Starr v. Robinson* (1814)** the same year.[32] This time the legislative act interfered with the payment of a jail bond. Moses Sage sat in Bennington jail, imprisoned for debt. He sought and obtained legislation allowing his release, but before the act was communicated to the sheriff Sage escaped. The suit was brought to collect on a bond that constituted a contract with the sheriff to prevent Sage's escape. The sheriff offered the legislative act as a defense, but this act was an impairment of contract, according to the Chief Judge, in violation of Article X of the U.S. Constitution, and of no legal effect. At the end of his decision, Chipman added this word of caution: "the Court ought anxiously to avoid any construction of a law, which would imply in the legislature, either an ignorance of their powers and duties, or a design to violate the national constitution."

Ten years later, Judge Asa Aikens wrote the court's decision in ***Bates v. Kimball* (1824)**.[33] Kimball had failed to appeal a decision of the probate court, awarding Bates a right to collect from an estate that Kimball was handling. Kimball sought legislative assistance, and an act was passed allowing him additional time for an appeal.

Aikens is Vermont's Marshall and *Bates v. Kimball* is our *Marbury*. Aikens's decision is the best articulation of the principles of judicial review. "It is a delicate and invidious task," he began, "for one department of the Government to review the decision of another, on a point, involving the powers of either; and that delicacy is not a little increased in the present instance, by the fact, that the Legislature have long been in the habit of passing acts of a similar character to the present." Clearly not all private acts adopted as legislation had been the subject of judicial review, and it was a practice the Legislature was unwilling to stop.

[32] *Starr v. Robinson*, 1 D. Chip. 257 (1814).
[33] *Bates v. Kimball*, 2 D. Chip. 77 (1824).

Judge Aikens discussed the proper role of the court:

> This constitution is the fundamental law of the State. The Legislature have not power to vary its provisions; yet, there is none so humble, but that he may demand his remedy, and is entitled to it, without delay, according to the laws, of which this is the chief. -For this remedy, the injured citizen is referred to the Courts of Justice. The interpretation of the laws is the proper and peculiar province of the Courts. It must therefore belong to them to ascertain the meaning of the constitution, as we see as the meaning of any particular act proceeding from the Legislative body. It is our duty, therefore, as well as our prerogative, to declare that alone to be the law, which is reconcilable with this fundamental law--this fiat of the sovereign people. ~

He based this conclusion on Articles 4 (certain remedy) and 9 (legislature has no power to alter constitution). Then Aikens turned to authorities, beginning with Federalist 78, acknowledging the judiciary's authority to regulate their decisions by the fundamental law. As if the check himself, Aikens explained that the court was not "impugning the honest intentions, or sacred regard to justice, which we most cheerfully accord to the Legislature." He seemed almost heartsick at having to invalidate a statute, but he maintained "the cheering hope that the result of that necessity will be regarded with candor and complacency, by that honorable body, against whose powers, as exercised on the point in question, it would seem to militate."[34]

Aikens turned to Montesquieu, Blackstone, Jefferson and Madison for support for the idea of a "distinct and separate existence of the three departments of government," and he cited the Council of Censors of 1820 as authority for judging private acts unconstitutional. "[W]hat the constitution has forbidden," he writes, "no statute of the Legislature can authorize. . . ." Then Judge Aikens turns to the private act. "Is it a law?" he asks.

> That which distinguishes a Judicial from a Legislative act, is, that the one is a determination of what the existing law is, in relation to a particular thing already done or happened; while the other is a pre-determination of what the law shall be for the regulation and government of all future cases falling within its provisions. . . . It is not a law, therefore; but a sentence or decree, proclaiming to the world, that the rights of these parties shall not remain determined, as they have been, "conformably to the laws;" but that the vested right of the one, under that determination, shall be divested, to the end that the other may avail himself of a special privilege beyond what appertains to the rights of other citizens. This, the Legislature have not power to do.

Aikens concluded the act was not law. It was an assumption of judicial power, prohibited by the constitution, repugnant to both the Vermont and U. S. Constitutions, and "a departure from the spirit and genius of our government."

[34] *Id*. at 78.

In ***Ward v. Barnard* (1825)**, the Legislature had allowed Barnard the right to appeal a final decision of the probate court, otherwise a final decision.[35] Judge Samuel Prentiss began with the same question as Aikens in *Bates v. Kimball*. Was the act a law? If retrospective, he concluded, it was not a prescribed rule of conduct. "An act conferring upon any one citizen, privileges to the prejudice of another, and which is not applicable in others, in like circumstances [according to Blackstone], does not enter into the idea of municipal law, having no relation to the community in general."

Judge Prentiss also wrote the decision in ***Staniford v. Berry* (1825)**.[36] The Legislature had allowed another appeal from a decision of commissioners appointed to settle an estate. Prentiss took little time with analysis, in light of *Bates v. Kimball*.

> That decision is a direct authority, that the act, under which this appeal was taken, is unconstitutional and void, as being an exercise of power by the legislature, properly belonging to the judiciary, and as being in the nature of a sentence or decree, rather than a law, wholly retrospective in its operation, and taking away a vested right. The case appears to have been maturely considered, and was decided on principles and authorities which are conclusive on the question. It is unnecessary, therefore, to enter at large into the question, at this time. And we have only to add, that the principles adopted in the case cited, have become settled constitutional law, and are universally recognized and acted upon as such, by all judicial tribunals in this country. They are found in the doctrines of learned civilians, and the decisions of able judges, without a single decision, or even opinion or dictum to the contrary. They not only grow out of the letter and spirit of the constitution, but are founded in the very nature of a free government, and are absolutely essential to the preservation of civil liberty, and the equal and permanent security of rights. The act under which the appeal was taken, being unconstitutional and void, the appeal must be dismissed.[37]

In ***Bradford v. Brooks* (1827)**, Judge Skinner ruled an act of the legislature amending a probate order a violation of the contract clause of the U. S. Constitution.[38] Further, the act was personal, not general,, "extending alike to all in like circumstances. It is retrospective in its effect, and goes to take away rights vested by the general law, and to give rights extinguished by the same general law, and we believe it an act which courts cannot enforce."

Judge Samuel Prentiss wrote the court's opinion in ***Lyman v. Mower* (1830)**.[39] Here the Legislature had freed a man named Edson from imprisonment for debt, and suspended all civil actions against him for a limited period. Judge Prentiss underscored the principle of *Ward v. Barnard*, that the act was "an enactment in a particular case, affecting private rights, was retrospective in operation, and, on the general principles of law, void." He noted the opinions of several Councils of Censors on the point—"composed of men of the first respectability for

[35] *Ward v. Barnard*, 1 Aik. 121 (1825).
[36] *Staniford v. Berry*, 1 Aik. 314 (1825).
[37] *See id.* at 316.
[38] *Bradford v. Brooks*, 2 Aik. 284 (1827).
[39] *Lyman v. Mower*, 2 Vt. 517 (1830).

intelligence, having great experience in legislation, and a thorough knowledge of the principles of our government." He went on to note that the court had continued to reflect on the issue and that "[s]ubsequent reflection has not shaken our confidence in the soundness and correctness of the decision."

Prentiss also wrote the decision in ***Kendall v. Dodge* (1831)**.[40] This was another suspension act, giving Jacob Dodge freedom from suit for a period of years. Prentiss gave the case no extended discussion, but simply pointed to *Ward v. Barnard* and *Lyman v. Mower* as authorities.

Private acts ceased to be an issue after 1831 in the reported decisions of the court. In ***Hill v. Town of Sutherland* (1831)**, however, the court first ruled a public act unconstitutional on similar grounds.[41] A change in the statute allowed appeals from some decisions of road commissioner retrospectively to a specified date. It was a general law, but it still created problems for the court.

The problem was the impact of a retroactive law on judgments declared final by the courts. This smacked of nullification. A decision final one day could be later the subject of an appeal and reversal. There would then be no end to conflict, no final arbiter of the law. If it were possible for the legislature to undo what the courts have done, "nothing would be dernier, but the loss of faith in our government," wrote Chief Judge Charles K. Williams.

Williams was careful to distinguish what constitutes unconstitutional legislation. "Statutes, which grant individual relief, are not, for that reason, void. It is their taking rights from other individuals, that renders them void. A general statute, with this effect, is void also."

In 1839, the Court was presented with a dispute over lease land rents from two competing grammar schools. The case was ***Trustees of Caledonia County Grammar School v. Burt* (1839)**.[42] The legislature had enacted a law in 1836, allocating the lease rents from certain western Caledonia County towns to Lyndon Academy, a new institution of higher learning. Caledonia County already had an operating grammar school at Peacham Academy, and Peacham had claimed rents on many Caledonia County towns for its support under a statute enacted by the General Assembly in 1795.

Judge Jacob Collamer wrote the decision for the Court. He began with the traditional reservation, describing the idea of voiding a legislative act as "[t]he most delicate and most important duty ever to be discharged by the judiciary . . . ." He was clear in explaining the limits of this authority. The Court's duty did not extend to judgments of policy or expediency in legislative actions. The decision to strike down a statute must be "clear and unquestionable."

The *Burt* case was interesting for another reason. The General Assembly had addressed the possibility of judicial review in the legislation itself. "[I]f the supreme court shall hereafter

[40] *Kendall v. Dodge*, 3 Vt. 360 (1831).
[41] *Hill v. Town of Sunderland*, 3 Vt. 407 (1831).
[42] *Trustees of Caledonia County Grammar School v. Burt*, 11 Vt. 632 (1839).

adjudge this act to be unconstitutional," according to the act, "said trustees shall have no claim on the state for damages, but shall take this act at their own risk."

This was not the last time the legislature would turn to the courts for direction or advice, or that governors would ask for direction. The position of the Supreme Court, the so-called weakest branch, was improving. All the apologies had been made. The legislature had now internalized the process.

Judge Collamer found the Dartmouth College case ended the discussion. "As the supreme court of the United States is the tribunal of dernier resort in all questions of this nature, we should govern ourselves by their decisions." A private charter is a contract. It vests rights in the grantees and their successors. Peacham had the rightful claim. Collamer explained you could not treat a private corporation any differently that you would an individual. "[I]t cannot be considered that our citizens hold their farms at the mere will and pleasure of the legislature." The 1836 law violated the U.S. Constitution in its prohibition of acts impairing the obligation of contracts.

In ***Atkins v. Town of Randolph*** **(1858)**, Judge James Barrett ruled a statute authorizing the appointment of a town agent to purchase liquors at the expense of a town without its consent was void.[43] The 1852 act was part of the state's efforts to control the sale and use of spirituous liquors. A county liquor commissioner would appoint town agents, who would purchase liquors for which towns would be liable, without the consent of the voters or the selectmen. Samuel Mann, the town agent, had purchased three barrels of Medford rum from Henry Atkins & Co. of Boston for the town, and the town refused to pay. Atkins took Randolph to court.

Article 10 of the Bill of Rights, the contract clause of the U. S. Constitution, was the accusation. The state had violated the federal constitution, argued the plaintiff. The defense was Article 5 of the Vermont Constitution, "that the people of this State, by their legal representatives, have the sole, inherent and exclusive right of governing and regulating the internal police of the same," but Barrett rejected that. He explained this provision granted no special authority, but merely designated the exclusive body to regulate such matters.

Barrett explained how "it would be disingenuous and savor of timorous delicacy" if the Court were to skirt the constitutional issue." He went to the heart of the question and found the statute void. He wrote: "We have less occasion for delicacy, arising from a feeling of deference towards a co-ordinate department of the government, in coming to the result we do in this case, for the reason that the legislature have anticipated us, by the amendment of 1853, in virtually declaring that the provision in the original act, for pledging the credit of the town, and binding it by the contract of the agent, without its consent and without indemnity, was unwarranted legislation."

Judge Milo Bennett dissented. He felt the legislature was completely within its constitutional prerogative regulating the police power through this act. "The law in no way acts upon a contract already made, but it attempts simply to impose a duty upon the towns for a public purpose, and this I think is within the constitutional power of the legislature if they see fit

[43] *Atkins v. Town of Randolph*, 31 Vt. 283 (1858).

to use it. It may safely be assumed that the constitution of this State allows to the legislature every power which it does not in terms, or by necessary implication, prohibit, or which have not been delegated to the federal government. To oust the jurisdiction of the legislature, the prohibition must be express, or a necessary implication."

Plimpton v. Town of Somerset **(1860)** is the first of a series of cases in which the Supreme Court struck down attempts by the legislature to reform the judicial process.[44] In this instance legislation attempted to avoid the length and cost of jury trials on the counties by requiring any case to be sent to a referee. The referee, appointed by the court, would decide whether there was a prima facie case to be brought to a jury. If the facts were insufficient, the case would be dismissed. If it were to go forward, the referee's findings would be presented to the jury as facts.

The Vermont Constitution guarantees jury trials. Article 12 provides "that when any issue in fact, proper for the cognizance of a jury, is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred." Section 31 of the Constitution made the same promise. "Trials of issues proper for the cognizance of a jury in the supreme or county courts, shall be by jury except when parties otherwise agree."

Judge Asa Aldis wrote the opinion for the Court. He traced the idea of a trial by jury, and noted instances where no jury trial was proper. In common law actions, a jury trial is mandatory.

To the argument that times have changed, and new methods required to resolve civil matters, Aldis remained firmly on the side of tradition:

> The constitution was intended to provide for the future as well as the past, to protect the rights of the people by every safeguard which their wisdom and experience then approved, whether those rights then existed by the rules of the common law, or might from time to time arise out of subsequent legislation. All the rights, whether then or thereafter arising, which would properly fall into those classes of rights to which by the course of the common law the trial by jury was secured, were intended to be embraced within this article. Hence it is not the time when the violated right first had its existence, nor whether the statute which gives rise to it was adopted before or after the constitution, that we are to regard as the criterion of the extent of this provision of the constitution; but it is the nature of the controversy between the parties, and its fitness to be tried by a jury according to the rules of the common law that must decide the question.

The right to a trial by jury is not satisfied by the "acting upon conclusions which some other tribunal has drawn from the evidence and argument." The short-cut will not satisfy the requirements of the constitution. If you want to change the system, Aldis suggested, amend the constitution.

[44] *Plimpton v. Town of Somerset*, 31 Vt. 283 (1860).

Opinion of the Judges of the Supreme on the Constitutionality of "An Act Providing for Soldiers Voting" **(1864)** is the first advisory opinion in the Court's history.[45] The act authorizing absentee voting among soldiers in the Civil War, serving beyond the borders of Vermont, had passed the House and Senate and been signed into law by the Governor, but the law included a provision authorizing a review by the Supreme Court before the legislation took effect, just as the act in *Trustees of Caledonia County Grammar School v. Burt* (1839). Chief Judge Luke P. Poland wrote the decision for the Court.

The Court was at a disadvantage, as it explained, in not having the benefit of argument by counsel or even the benefit of a deliberative process within the court, as its members could not all be present to discuss the decision, but an opinion was issued nonetheless.

The Court felt obliged to respond to the inevitable criticism of those who felt Vermont owed everything it had to the support of its soldiers. Imagine denying our soldiers their right to vote. "We appreciate the noble patriotism of our citizens who have voluntarily gone forth to peril their lives in the defence of the constitution and government, and would be the last to deprive them of the exercise of any civil right . . . ." But not at the expense of the constitution they were fighting to protect. The voting on federal officials was lawful, but absentee voting on state officers was not, as Section 7 of the Vermont Constitution required voting within Vermont.

In ***State v. Peterson*** **(1869)**, the right to a trial by jury was again an issue. Benjamin Peterson was convicted of manufacturing intoxicating liquor (sour hop beer, which one witness could not say was strong or small beer). The Burlington City charter gave justices of the peace final jurisdiction over certain small crimes, without a right to a jury trial, and Peterson appealed claiming the Vermont Constitution guaranteed him that right.

Judge William C. Wilson wrote the decision for the Court. No one need be misled that the Court intended to be easy on those who violated the law.

> The manufacture of intoxicating liquor is the source of intemperance. Intemperance, the legitimate consequence of the use of intoxicating liquor as a drink, has been and is the source of innumerable evils to individuals and society, and productive of more wretchedness and crime than any other cause. This being so, the act of our legislature entitled an act "to prevent the traffic in intoxicating liquors for the purpose of drinking," prohibits the manufacture of such liquors and renders the violators of its provisions subject to public and severe punishment.

Judge Wilson found Article 12 and Section 31, both dealing with the right to a jury trial, a compelling argument against the charter.

> The constitutional right of trial by jury is not made to depend upon legislation as to the jurisdiction of courts which do not try causes by jury according to the rules of the common law; nor upon the question whether the act complained of is a violation of a police regulation; nor upon the form of the charge, whether it be by indictment, information or upon complaint; nor upon the

[45] *Opinion of the Justices*, 37 Vt. 665 (1864).

> will of the prosecutor, as to the court in which the prosecution is commenced; nor upon the judgment of the justice or police court as to whether he will take cognizance of the offense; nor upon the amount of the fine or penalty; but the right is absolute, and it is secured to the accused because in all prosecutions for criminal offenses the issue in fact, therein to be tried, is eminently proper for the cognizance of a jury. The constitution says the right of trial by jury "ought to be held sacred." These are not mere sounding words, but they express the excellence of this mode of trial in the judgment of every American citizen, and the liberties of the people everywhere depend upon the sacredness in which this right is held.

Kellogg v. Page **(1871)** invited the Court to decide whether a resolution, adopted by the Vermont House and Senate, but not signed by the Governor, was enforceable. Loyal C. Kellogg owned state bonds, and wanted to cash them in, to be paid in coin. The resolution had authorized the State Treasurer to pay these bonds in coin, but Treasurer John Page refused, offering to pay him in treasury notes (or greenbacks). Kellogg asked for a mandamus. Judge Isaac Redfield, for the Court, reviewed the resolution and denied his request.

> It is claimed that the joint resolution of the senate and house of representatives, without the approval of the governor, imposes no legal duty upon the treasurer. This resolution purports to authorize the treasurer to draw money from the treasury. The 17th sec. part 2d of the constitution of this State declares that "No money shall be drawn out of the treasury unless first appropriated by act of legislation." The 11th sec. of the articles of amendment declares that "Every bill which shall have passed the senate and house of representatives shall, before it becomes a law, be presented to the governor," &c. There would seem no ground for claiming that this joint resolution of the two houses has the character of a legal enactment.

In ***Tyler v. Beacher*** **(1871)**, Judge Hoyt Wheeler held sections of the state's flowage statutes unconstitutional in violation of Articles 1, 2 and 10 of the Vermont Constitution.[46] Grist mills, ruled Judge Wheeler, are not public uses, because the law does not require mill owners to grind the grain of anyone who requests it. As "well and sufficiently" as they were required to grind, the mills were private property and the public has no right in them.

H. Porter Tyler owned a mill in Island Pond. To raise the water in the pond behind it, he needed land owned by William Beacher and others. Tyler claimed statutory privileges to take their property. Judge Wheeler addressed the constitutional protections to private property:

> The first article of the first part of the constitution declares acquiring, possessing and protecting property to be among the natural, inherent and inalienable rights of persons. The second article of the same part declares that private property ought to be subservient to public uses when necessity requires it, but that whenever taken for the use of the public, the owner ought to receive an equivalent in money. These declarations together are equivalent to a declaration that private property ought, upon compensation made in money, to be subservient

[46] *Tyler v. Beacher*, 44 Vt. 649 (1871).

to public uses when necessity requires it, and to no other uses, even though necessity should require it, and compensation should be made.

As the mills were not public uses, no eminent domain was justified.

Barnes v. Dyer **(1884)** was the first case in Vermont legal history a tax was declared invalid.[47] That was a tax imposed by the Vergennes city charter to pay for sidewalks. It was assessed against landowners based on a vague formula, as the city council deemed "just and equitable." Judge Wheelock Veazey, writing for the Court, struck it down as violating Article 9 (authority to tax) of the Vermont Constitution. There must be standards, "not susceptible to different applications to different individuals of the class to which it applies." Without standards, there is only arbitrary injustice in the imposition of taxes.

State v. Pratt **(1887)** is the first of a series of cases in which the Court favors the promotion of business over state regulatory schemes. A peddler named Pratt tried to sell tea without a license, and was convicted. On appeal, Judge H. Henry Powers declared the state's peddler licensing law invalid as a violation of the Commerce Clause of the U.S. Constitution.[48] The statute required a license for peddlers of foreign goods, but not for goods of domestic manufacture. "Free intercourse and travel between the states, and with foreign countries, can be safely regulated only by that jurisdiction that looks to the general interests of the nation as a whole, rather than the separate advantage of a particular locality."[49]

In ***Town of Strafford v. Town of Sharon*** **(1889)**, Sharon wanted Strafford to help pay for a bridge linking the two towns.[50] Strafford claimed rights granted by a new law that allowed it to escape liability. The Court had to decide the question. Judge Homer Royce, writing for the Court, found the new law, to the extent that it attempted to repeal or cancel rights vested in the earlier law, unconstitutional as a violation of Article X of the U. S. Constitution. It violated vested rights by its retroactive effect. He cited Chancellor Kent (1 Kent, Comm. 455) that retrospective statutes affecting vested rights are generally considered unconstitutional in this county.

"For a full discussion as to whether the legislature has the power to vacate or annul an existing judgment between party and party, see Bates v. Kimball, 2 D. Chip. 77. If they have not the power expressly and directly to do this by an annulling act, no more have they to do it impliedly and indirectly."

State v. Speyer (1895) warrants mention in this place.[51] This was not an exercise of judicial review of legislation. Here the Court ruled an ordinance of the State Board of Health prohibiting pigpens within 100' of a dwelling house invalid. In the words of Judge Henry Start, the regulation was unreasonable. "It is founded on fear and apprehension of a remote possible danger to the public health, and not upon its existence, or upon reasonable grounds to apprehend

[47] *Barnes v. Dyer*, 56 Vt. 469 (1884).
[48] *State v. Pratt*, 59 Vt. 556 (1887).
[49] *See id.* at 559.
[50] *Town of Strafford v. Town of Sharon*, 61 Vt. 126 (1895).
[51] *State v. Speyer*, 67 Vt. 502 (1895).

that any considerable portion of the pigpens affected by it endanger or will endanger public health." The germ theory had yet to be recognized by the Supreme Court. That came with *State v. Morse* (1909).[52] The constitution was not directly cited by Judge Start. The rule was beyond the authority of the agency's rulemaking power. The executive branch had failed to remain within a permissible legislative delegation.

***New England Trout Club v. Mather* (1896)** dealt with a fundamental question.[53] Should the public be allowed to cross private property—in this case land surrounding Marlboro Pond—to reach boatable waters? Writing for the Court, Judge John Rowell believed not, over the strong objections of Judge Laforrest H. Thompson. The statute defined all waters over which the state has jurisdiction, except private preserves and posted waters, as public waters. Crossing uncultivated land to reach public waters, for the purpose of taking fish, was declared not to be actionable, unless actual damage was done.[54]

Rowell recited Section 40 of the Vermont Constitution, guaranteeing the right to fish in all boatable waters and other waters (not private property). Writing for a majority of the court, he ruled that "boatable" does not mean boatable in fact, but only as applied to waters accessible by public rights of way or navigable waters.

In dissent, Judge Thompson regarded this as an offense to the tradition and history of the state. "It is a matter of common history that, within a very few years last past, there have been, and now are, a few persons resident in this and other states who have anxiously sought for some way by which they could convert into private fish preserves, controlled by themselves, many streams and ponds in this state, boatable in fact, and in which its inhabitants have fished as public waters ever since the adoption of the constitution of 1777." Thompson wrote that the "freedom to associate with and enjoy nature has borne fruit in the independent, libertyloving character of our people, and has had its influence in forming a type of manhood that has had a potent influence in making Vermont to-day, in many respects, the ideal republic of the world."

At the end of Judge John Rowell's decision, he mentions an unreported case of judicial review. "On the same ground, the drainage act of 1868, No. 26, was held unconstitutional in the unreported case of ***Abbott v. Ware***, in Orange county, decided at the March term, 1874, I think. I remember that Judge Pierpoint said, in disposing of that case, that the legislature could as well pass a law that he might pasture his cow in his neighbor's pasture as to pass one that he might drain his swamp across his neighbor's meadow."

***State v. Hoyt* (1899)** was a federal constitutional challenge to a statute regulating peddlers.[55] Charles L. Hoyt was arrested for peddling without a license, and he brought a due process challenge to the act. The statute had recently been amended to limit the licensing of peddlers carrying goods manufactured in Vermont but not those carrying goods manufactured in other states. John Rowell wrote the decision for the Court. To affirm the statute "would allow a state to discriminate against its own citizens in favor of the citizens of other states, which it

[52] *State v. Morse*, 84 Vt. 387 (1909).
[53] *New England Trout Club v. Mather*, 68 Vt. 338 (1896).
[54] Acts 1892, No. 80, §§ 1, 31.
[55] *State v. Hoyt*, 71 Vt. 59 (1899).

cannot do, any more than it can discriminate in favor of its own citizens against the citizens of other states, for the equality clause of said amendment includes everybody."

State v. Cadigan **(1901)** illustrates the Court's continued pro-business attitude.[56] The statute named a state official the attorney for a foreign corporation selling bonds within the state. Domestic corporations were not accorded the same treatment: they might name their own attorney or forgo the requirement altogether.

F. D. Cadigan was convicted of selling bonds in Vermont without a license. Stafford ultimately relied on equal protection for his decision. Judge Wendell Stafford wrote the decision for the Court, concluding that Article 1 of the Vermont Constitution, in its guarantees to possess property, and Article 10 of the U. S. Constitution were both violated. "To hedge the privilege about with conditions and exactions for one class which do not exist for others is to deny to the former the equal protection of the laws; and when the classification is based upon a distinction wholly fanciful or arbitrary, having no possible reasonable connection with any proper purpose to be served by the enactment, it is unconstitutional and void."

"These are the fundamental principles, not of our state, only, but of Anglo-Saxon government itself, enlarging upon the axiom that when the facts are the same the law is the same, and inspired by the ideal of justice, and the law is no respecter of persons."

In re Conditional Discharge of Convicts **(1901)** was directed at a statute that authorized the Board of Prisons to parole or commute sentences of convicts, a power reserved by the Vermont Constitution to the Governor. The legislature was unsure of the validity of the new law, and made the act contingent upon approval by the Supreme Court. Governor William Stickney addressed the Court in a letter, asking for its opinion on the validity of the legislation. In a per curiam decision, the Court quietly laid it to rest as unconstitutional.[57] The law violated Section 20 of the Vermont Constitution, which allocated the pardoning power to the Governor.

Query: how does the Parole Board function constitutionally now?

State v. Shedroi **(1903)** confronted another question on peddler's licenses.[58] Albert Shedroi was convicted of peddling without a license. He challenged the statute on Fourteenth Amendment grounds. Under the law, veterans of the Civil War were granted exemptions from the license. Judge John Watson could find no relationship between service as a soldier and work as a peddler, and declared the statute void as violating equal protection, and citing *State v. Harrington* and *State v. Cadigan* as authorities. "We think it clear that the discrimination made in the law in question in favor of persons who served in the War of the Rebellion and were honorably discharged is without reasonable ground, and arbitrary, having no possible connection with the duties of the citizens as taxpayers, and their exemption from the payment of the tax therein required."

[56] *State v. Cadigan*, 73 Vt. 245 (1901).
[57] *In re Conditional Discharge of Prisoners*, 73 Vt. 414 (1901). Compare *Caledonia CountyGrammar School* (1839) and *Soldiers Voting* (1864).
[58] *State v. Shedroi*, 75 Vt. 277 (1903).

***State v. Dodge* (1904)** was a successful Fourteenth Amendment attack on Vermont's anti-trading stamp law.[59] Walter Dodge was convicted of giving out trading stamps. When he sold some property to a man, he gave him three coupons to obtain a watch chain from another company. It was part of a promotional campaign, but the state treated it as a crime. Dodge argued due process, that his liberty was infringed by the statute, and the Court agreed.

Judge Henry Start found the statute to be an improper exercise of the police power. The stated purpose of the law—to eliminate games of chance—was remote from this imposition into the private affairs of business. There was nothing public about this business, he wrote.

***State v. Abraham* (1905)** was another licensing case.[60] The statute required all pharmacists to be licensed. It also required only licensed pharmacists to dispense regulated drugs, with exceptions. One allowed those who sold general merchandise to dispense drugs. Another permitted widows of deceased pharmacists to continue to operate a pharmacy until the estate was settled. Abram Abraham of Rutland was convicted of dispensing drugs without a license. He challenged the law.

Judge Loveland Munson wrote the decision for the Court. He found the Fourteenth Amendment was violated by these exceptions. Rather than declaring the entire chapter void, however, the Court struck only the exemptions, to the disappointment of the defendant, whose conviction was upheld.

***Corliss v. Village of Richford* (1911)** is a case reminiscent of *Barnes v. Dyer* (1994).[61] Richford Village attempted to assess Gilman Corliss (among others) for a portion of the cost of a new sewer line running along his property on the basis established in its charter—a "just share of the expense." He disagreed with the method of assessment and appealed to the Supreme Court, where Judge George M. Powers wrote the decision for the Court. Powers found the statute invalid. Judge Powers concluded "just share" was no standard. "[T]he only legal basis for assessments of this kind is the special benefits conferred by the improvements involved . . . in excess of the benefits enjoyed by the general public." Article 9 of the Vermont Constitution (power to tax) was violated, and the methodology for assessing taxes was void.

***In re Municipal Charters* (1913)** poses another question about the proper role of the Court.[62] As with *In re Conditional Discharge of Convicts* (1901), Governor Allen Fletcher asked the Court for an advisory opinion about the constitutionality of a bill he was about to sign that gave the Public Utility Commission the authority to review and amend town charters. In a per curiam decision, the Court decided this was an improper delegation of legislative authority, in light of Section 6 (powers of the legislature):

> This power is essentially a trust, and requires the exercise of judgment and discretion in its execution, and no authority is given to delegate it. The Legislature must, therefore, exercise its own judgment and discretion in its execution as far as

[59] *State v. Dodge*, 76 Vt. 197 (1904).
[60] *State v. Abraham*, 78 Vt. 53 (1905).
[61] *Corliss v. Village of Richford*, 85 Vt. 85 (1911).
[62] *In re Municipal Charters*, 86 Vt. 562 (1913).

> necessary to discharge the personal trust committed to it. This, however, is not saying that the Legislature can delegate nothing concerning this matter, for there are undoubtedly some things pertaining to it that the Legislature can delegate. But we are not called upon to draw the line between the delegable and the nondelegable, nor to suggest a way in which the desideratum of a general law for the incorporation of villages can be attained.
>
> Testing the act by the general principle above stated, we think it goes too far when it leaves to the Commission to determine the plan and frame of government of the proposed village, what powers and functions it may exercise, and what shall be the limit of its expenditures and indebtedness, for these are question of legislative judgment and discretion, and therefore their determination cannot be delegated.

***In re Dewar* (1930)** invalidated a statute requiring those convicted of intoxication to disclose the names of the sellers of the drinks.[63] Once he was convicted, Harry Dewar refused to answer, claiming it would incriminate him. He challenged the law as a violation of Article 10 of the Vermont Constitution (prohibition against self-incrimination) and prevailed.

Justice George Powers wrote the decision for the Court. "This simple declaration of ten words ("Nor can he be compelled to give evidence against himself") embodies a safeguard of civil liberty as sacred and inviolable as any of the fundamental guarantees for the protection of personal rights." Powers recognized the zeal with which the legislature sought to control the sale of intoxicating liquors, but found the statute unconstitutional and void.

Village of St. Johnsbury v. Aron (1930) is not strictly a case involving the exercise of judicial review, but it has a place in this chronology. The decision focuses on a junk dealer's licensing ordinance that gave total discretion to the village trustees to decide where a junk yard might be located. [64]. Jacob Aron opened a junk yard, and was convicted of violating the ordinance. Justice Sherman Moulton wrote the decision and focused on the portion of the ordinance that gave total discretion to the village trustees to decide where a junk yard might be located.

The statute violated the Fourteenth Amendment (equal protection) "since it did not prescribe a rule and conditions for the regulation of the use of laundry property to which all similarly situated might conform, but divided the owners and occupiers of wooden buildings into two classes, not having respect to their personal character and qualifications for the business nor the situation and nature and adaptation of the buildings themselves, but merely by an arbitrary line, on one side of which were those who were permitted to pursue their industry by the mere will and consent of the supervisors and on the other those from whom that consent was withheld at their mere will and pleasure."

[63] *In re Dewar*, 102 Vt. 340 (1913).
[64] *Village of St. Johnsbury v. Aron*, 103 Vt. 22 (1930).

***Town of Waterbury v. Melendy* (1938)** involved a statute authorizing an appointed Board of Public Works to allocate flood control money on its own discretion, without standards.[65] Emery Melendy was a member of the Board. Twelve municipalities joined to oppose the legislation on grounds familiar to the Court in *Village of St. Johnsbury v. Aron*, *Corliss v. Village of Richford*, and *Barnes v. Dyer*. Justice Fred Buttles wrote the decision for the court. He concluded the statute required the commission to "say what the law shall be, and not merely exercise discretion as to its execution." Judge Buttles found improper legislative delegation, pursuant to the U. S. Constitution, Article I, Sections 1 and 8, and Article 9 (proportional contribution) and Sections 2 (supreme legislative power), 5 (separation of powers) and 6 (legislative powers) of the Vermont Constitution. He wrote:

> How is the commission to determine, in advance of hearing, what municipalities are benefited, to whom notice of hearing is required to be given? What is the basis of apportionment as between the state and the municipalities? How are the benefits to the municipalities to be determined? Shall it be only on the basis of probable flood protection to riparian property owners, thus requiring assessment of the whole town for the direct benefit of riparian owners only? Is riparian land alone to be considered, or land liable to flowage on a basis of frontage, area, or value, or shall consideration also be given to the personal property of great value which is subject to flood risk in some of the towns and cities? Or is the term "benefits" to be restricted to benefits which the municipality itself, apart from its citizens, may receive, such as protection to its highways and parks and public buildings and any lands to which it may have title? Or is the term to be given a wider application and held to include not only protection to property, but also to life of the inhabitants and intangible benefits like a greater sense of security on the part of inhabitants and sojourners, possibly tending to attract more business to the town?
>
> The statute itself gives no answers to these questions.

Vermont Salvage Corp. v. Village of St. Johnsbury (1943) is another case, like *Village of St. Johnsbury v. Aron* (1930) where the Court invalidated a local ordinance. The case brought the village back into the spotlight on yet another junk dealer problem.[66] This time the ordinance raised high fees ($200 per junk yard) for town purposes. The Court found it violated the Fourteenth Amendment (equal protection) and the contract clause. Justice Olin Jeffords wrote the decision for the Court, explaining, "It seems to us that the inescapable conclusion to be drawn from this increase is either that it was made to provide revenue for the village or to prohibit the maintenance of junk yards therein. Inasmuch as both of these purposes are beyond the power of the village to carry out we hold that the license fees in the ordinance as amended are invalid."

***In re Opinion of the Justices* (1949)** (also known as *In re Constitutionality of H. 88*) raises the same issue as *In re Municipal Charters* (1913)).[67] The Legislature passed a statute

[65] *Town of Waterbury v. Melendy*, 109 Vt. 524 (1938).
[66] *Vermont Salvage Co. v. Village of St. Johnsbury*, 113 Vt. 524 (1943).
[67] *In re Constitutionality of House Bill 88*, 115 Vt. 341 (1949). Compare *Opinion of the Justices* (1863), *infra.*

codifying the long-standing practice of asking the Court for advisory opinions. Governor Ernest Gibson wrote the Court about the constitutionality of this statute. He had "grave doubts" about its consistency with Section 5 of the Vermont Constitution (separation of powers). A letter signed by the full Court contained the answer. The governor's suspicions were correct. While other states' constitutions allowed advisory opinions, Vermont's Constitution was silent. Whatever advice was given, it would not have the force of judicial authority, the justices explained, "since they are not given in the exercise of the judicial function, and are not regarded as binding upon the court, or upon the individual members thereof, even though the same question should be later presented in the regular course of judicial proceedings."

There is a small irony at work in this case. The Court spent most of the opinion explaining why advisory opinions are unconstitutional; as the opinion ended, it sounded as if the Court was good for one more. "In giving our reasons for declining to comply with your Excellency's request, we have incidentally but necessarily indicated that your doubt as to the constitutionality of House Bill No. 88 is well founded."

Granai v. Witters **(1968)** is a curious case. The statute authorized lawyers serving in the legislature to have a case continued until the end of the session.[68] C. O. Granai, Barre City's representative to the House, sought to prohibit the Orleans Superior Court from hearing two divorce cases at the end of the legislative session.

Justice P. L. Shangraw wrote the opinion of the Court. He found the statute to be in violation of Article 4 (certain remedy), Section 6 (legislature has no power to alter the constitution) and Section 28 (courts shall be open for trial of all causes . . . without . . . unnecessary delay) in the statute. It was legislation that hampered and interfered with judicial action, and it was void. It is a usurpation of the judicial function. Urged to find a federal constitutional reason, the Court demurred, concluding the Vermont Constitution was sufficient to reach a decision on the constitutionality of the statute.

Mikell v. Town of Williston **(1971)** invalidated the statute that ordered towns to distribute the lease rents for the first settled minister among the religious societies of the town, on the grounds that it violated First and Fourteenth Amendments to the U.S. Constitution.[69] Justice Albert Barney wrote the decision of the Court. His decision did not rely on Article 3 of the Vermont Constitution, as argued by appellant, but relied on the federal authorities instead, as he ordered "that all rental and leasehold income derived from the lot originally granted for the support of the ministry [to] henceforth become part of the general revenue of the Town and [. . .] not be distributed to any religious organization."

In ***Beecham v. Leahy*** **(1972),** the Court struck down the state's anti-abortion law on Article 1 grounds, explaining that if the police power "is invoked through means or methods which are unreasonable, inappropriate, oppressive or discriminatory, constitutional limitations are transgressed, individual rights are invalidated and the action is void."[70] The statute prohibited abortions and made any physician culpable for performing the operation. In this case,

[68] *Granai v. Witters*, 123 Vt. 468 (1963).
[69] *Mikell v. Town of Willston*, 129 Vt. 586 (1971).
[70] *Beecham v. Leahy*, 130 Vt. 164 (1972).

the doctor had concluded a medically induced and supervised abortion is medically indicated in order to secure and preserve the plaintiff's physical and mental health. The problem was that the statute, "without reason or warrant, deprives a woman of medical aid, even though she may be afflicted in body or mind, or both, short of imminent death, in relation to the exercise of a right recognized and allowed by the very same statute." It was a violation of Article 1 of the Vermont Constitution, according to the opinion written by Justice Albert Barney.

Veilleux v. Springer **(1973)** focused on the state's implied consent law governing the crime of driving while under the influence of alcohol.[71] If a defendant pled nolo or not guilty, he would be subject to the risk of a civil penalty as a result of a summary proceeding to decide whether the officer had a reasonable belief to conclude he was guilty. Pleading guilty, that same defendant would not suffer this penalty. Plaintiff claimed this violated the Due Process Clause of the Fourteenth Amendment of the U. S. Constitution.

The Court, through Justice Rudolph Daley, found reason in the Equal Protection Clause of the Fourteenth Amendment to justify voiding the statute. The classification of a different criminal penalty for those who pled guilty and not guilty was arbitrary and irrational.

In re Eddy's Estate **(1977)** invalided a statutory fee for distribution by decreee of proceeds from an estate based on a percentage of the estate.[72] Justice Robert Larrow wrote the decision. Article 9 (proportional contribution) "is the practical equivalent of the equal protection clause of the Fourteenth Amendment to the United States Constitution," explained the Justice. The Court could find no rational basis for the fee, "no expressed legislative classification to honor or to reject, and no apparent basis for the classification which in fact resulted from the legislation." It was a "palpable" violation of Article 9, as the Legislature apparently intended to impose a fee but in fact imposed a tax.

State v. Carpenter **(1980)** concluded that a state statute enforcing penalties against employers for nonpayment of wages violated Section 40 of the Vermont Constitution.[73] Chief Justice Albert Barney wrote the Court's decision, and he found the statute was "not only a shield for the protection of the commonweal, but a club with which individual compensation is coerced. To that extent it bears the character of a private debt collection device." The respondent argued a violation of equal protection, but the Court on its own motion found a violation of one part of the statute, on the grounds of Section 40 (bail). It affirmed the penalties imposed against the respondent.

This case, like *State v. Abraham* (1895), discussed above, shows the Court in the role of a constitutional surgeon. It agrees something is unconstitutional, removes it, and allows the patient to live. In these cases, its decision failed to satisfy the respondent, who had hoped to have the whole chapter declared unconstitutional. In other cases, such as the one that follows, one part was offensive enough to invite voiding of the entire regulatory scheme.

[71] *Veilleux v. Springer*, 131 Vt. 33 (1973).
[72] *In re Eddy's Estate*, 135 Vt. 468 (1977).
[73] *State v. Carpenter*, 138 Vt. 140 (1980).

State v. Ludlow Supermarkets, Inc. **(1982)** voided Vermont's blue laws, after the Court found the statute intentionally favored small stores over large ones.[74] This was the first Vermont decision applying Article 7 (common benefits clause) to judicial review. Chief Justice Albert Barney wrote the decision for the Court.

For the first time in decades, the Court began its decision with a recognition of the necessary approach to accused legislation that is required in judicial review. "State courts [. . .] have a duty of judicial restraint which encompasses, similarly, deference to legislative exercise of the sovereign power allocated to that body by the state constitution."

> The State makes the statement that there is no constitutional right to shop on Sunday. This stands constitutional law on its head. Our constitutions are restraints on governmental powers. The rights of citizens are not conditioned on grants given by constitutional fiat, but exist without the aid of expressed governmental permission, subject only to properly authorized circumscription where the public welfare requires. Since the citizens have long since chosen to be governed through a limited grant of authority to each branch of government, it is their right, and this Court's duty, to see that any legislative action prohibiting as a crime otherwise lawful activity is bottomed on the proper exercise of a constitutional power assigned to the legislative branch.

Reminiscent of the separation of powers cases of the 1814-1839 period, this act was preferential legislation, in the eyes of the Court. The purpose of this type of legislation "must be to further a goal independent of the preference awarded, sufficient to withstand constitutional scrutiny." In this case, the statute failed that test.

Kennedy v. Chittenden **(1983)** was a challenge to the state's election laws authorizing recounts and contests of elections of House members following a General Election. Since the Vermont Constitution gave the House the authority to judge the qualifications of its members, the Supreme Court, through a per curiam decision, ruled the statutes in violation of Section 6 (legislative powers). The opinion also faulted the statute because the "exercise of judicial authority must lead to a final enforceable result and not be merely informative or advisory," citing *In re Constitutionality of House Bill 88* (1949).

In these cases, the Court is establishing territory, reminiscent of *Opinion of the Justices* (1949) (advisory opinions). A separate and distinct judicial branch does not accept statutory duties that conflict with the Court's understanding of the constitution.

Solomon v. Atlantis Development, Inc. **(1984)** concluded that a statute, designed to cure a problem of whether assistant judges should sit with the presiding judge in certain cases, as a violation of Section 5 (separation of powers).[75] Following the decision in *Soucy v. Soucy Motors, Inc.* (1983),[76] the Legislature fashioned a statutory solution by defining precisely which

[74] *State v. Ludlow Supermarkets, Inc.*, 141 Vt. 261 (1982).
[75] *Solomon v. Atlantis Development, Inc.*, 145 Vt. 70 (1984).
[76] *Soucy v. Soucy Motors, Inc.*, 143 Vt. 615 (1983).

cases were appropriate for the side judges. It included a moratorium on challenges to cases decided before *Soucy*, to avoid an onslaught of motions to reopen.

Justice William Hill wrote the decision. The issue was whether the legislature had the power to make an act retrospective. The statute read, "After [April 27, 1984], no court shall set aside any judgment, decree or order entered before December 12, 1983 by the superior court in an action, appeal or other proceeding on the grounds that the participation or nonparticipation of assistant judges was improper under 4 V.S.A. §§ 111(a) or 219."

Looking at *Bates v. Kimball* (1914), the Court found its answer. The Legislature had violated Section 5 (separation of powers) of the Vermont Constitution. It had gone beyond its authority to "prescribe the rule of civil action" by deciding "the prospectivity or retrospectivity of a rule of law established by the judicial branch."

In re Club 107(1989) is another case that does not qualify for our precise definition of judicial review, as the subject of the Court's actions is an administrative rule.[77] *State v. Speyer* (1895) also addresses the subject. The Liquor Control Board had adopted rules governing entertainment, including a prohibition against nude dancing. Club 107 was cited for violating the rules and convicted by the Board. On appeal, the club challenged the authority of the Board to adopt the rule on constitutional grounds, arguing the rule was a violation of Article 13 (free speech) of the Vermont Constitution.

Justice John Dooley's opinion never reached the issue of free speech, as the Court found the statute unconstitutional and void as a violation of the Board's statutory authority to regulate the use of alcoholic beverages. The statute did not violate the constitution. The Board had gone further than the law allowed it.

***Choquette v. Perrault* (1989)** voided the state's fence viewer law as a violation of Article 7 (common benefits) of the Vermont Constitution.[78] The Choquettes wanted the Perraults to help maintain a fence that separated them, but the Perraults owned no livestock.

Justice Ernest Gibson III subjected the fence viewers law (that authorized town-appointed fence viewers to allocate the burden between neighbors over the maintenance of a common fence) to review "to test the reasonableness and appropriateness of the legislation to accomplish the result intended without oppression or discrimination." Justice Gibson began his analysis by citing *Vermont Woolen Corp. v. Wackerman* (1961), that "[n]o fundamental right or suspect class was involved here, so the Court must decide whether the law is reasonably related to the promotion of a valid public purpose. The Court concluded the purpose of maintaining common fences for agricultural purposes had long since become obsolete. It found that when a specific class of persons benefited at the expense of a few private landowners, the statute had no reasonable relation to a public purpose. The law was "burdensome, arbitrary and confiscatory, and therefore cannot pass constitutional muster."

[77] *In re Club 107,* 152 Vt. 320 (1989).
[78] *Choquette v. Perrault*, 153 Vt. 45 (1989).

***Wolfe v. Yudichak* (1989)** invokes Sections 5 (separation of powers), 28 (courts of justice) and 40 (bail) of the Vermont Constitution to declare a statute void. That act attempted to direct the courts in its decisions on whether to appoint retired justices to temporary service on the Court.[79] The case arose out of a dispute over a fire truck accident. Once the case was before the Court, one party challenged the participation of a retired justice, citing a statute that treated the appointment of a justice who is not confirmed by the Senate is terminated by the failure to consent. Justice John Dooley wrote:

> It has long been the practice of this Court that a justice who resigns or retires from this Court after hearing a matter may participate fully in consideration of the case thereafter. This practice is grounded in the Court's inherent judicial and administrative powers as found in the Vermont Constitution, Chapter II, § 30. It conflicts neither with the Governor's power to appoint nor with the Senate's power to confirm, and relates strictly and narrowly to the Court's inherent power to complete in succeeding terms what was begun in earlier ones. This power is critical to a Court with such a high caseload that cases sometimes take a year or more for an opinion to be written. The consequence of petitioner's argument is that the most difficult cases presented to this Court--those on which members of the Court have differing views--are always at risk of continuous indecision and reargument. We do not believe that we can function effectively to discharge our constitutional responsibilities under such circumstances.

***Oxx v. Vermont Department of Taxes* (1992)** found the state's piggy-back tax of recapture of earlier investment tax credits unconstitutional, as a violation of Article 7 (common benefits) and the Fourteenth Amendment.[80] Justice James Morse explained that a "statute is unconstitutional, as applied, if it treats similarly situated persons differently and the different treatment does not rest upon some reasonable consideration of legislative policy." The Court found that similarly situated taxpayers who are subject to the federal investment tax credit, would pay "disproportionate state taxes," and struck down the statute. There are distinctions and differences throughout the tax system, but here the "different treatment does not rest on any rational basis" or make the administration of taxation simpler (one of the purposes of the income tax laws).

***Lorrain v. Ryan* (1993)** concluded that a section of the state's worker's compensation law that prohibits a suit for loss of consortium by the spouse of a claimant was void as a violation of Article 7 (common benefits).[81] Justice John Dooley explained the Court's difficulty in finding a rational basis for a statute that attempted to regulate persons who have "nothing to do with the employer-employee relationship."

***MacCallum v. Seymour* (1996)** voided a statute denying adopted children the right to inherit from collateral heirs on the grounds that it violated Article 7 (common benefits).[82] Justice John Dooley wrote, "The effect of the presumed-intent rationale [presuming that relatives would

[79] *Wolfe v. Yudichak*, 153 Vt. 235 (1989).
[80] *Oxx v. Vermont Department of Taxes*, 159 Vt. 371 (1992).
[81] *Lorrain v. Ryan*, 160 Vt. 202 (1993).
[82] *MacCullom v. Seymour*, 165 Vt. 452 (1996).

not want their relatives' adoptive children treated as heirs] is to make statutory discrimination lawful as if it were private discrimination. "In 1880, or even in 1945, the Legislature might have concluded that collateral kin would expect intestate succession to be limited to the bloodline and exclude adopted persons. That presumption is no longer reasonable in 1996. We no longer rely on antiquated notions of the adoptive relationship as " 'a civil or contractual, an artificial, as contradistinguished from a natural status.' "[83]

***Brigham v. State* (1997)** was a challenge to the state's system of funding education.[84] A per curiam decision (unanimous) concluded Article 7 (common benefits) and Section 68 (competent number of schools) of the Vermont Constitution was violated by a system that left different schools with large discrepancies in educational resources. The Court found an equal educational opportunity to be a fundamental right. The "mere fortuity of a child's residence" is not a policy. The Court then sent the case to the legislature for action.

***Baker v. State* (1999)** applied Article 7 (common benefits) to conclude the impact of the state's marriage laws on committed gay and lesbian couples was discriminatory and offensive.[85] Chief Justice Jeffrey Amestoy wrote for a majority of the Court that the common benefits clause "expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage."[86]

"[O]ur task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined." After listing some of the benefits of marriage, the Court turned the matter over to the legislature to "consider and enact legislation consistent with the constitutional mandate described herein."[87]

Although both *Brigham* and *Baker* justify a more more extended analysis and discussion, Justice Amestoy's words about the Court role in reading the Vermont Constitution deserve a place in this essay:

> We typically look to a variety of sources in construing our Constitution, including the language of the provision in question, historical context, case-law development, the construction of similar provisions in other state constitutions, and sociological materials. The Vermont Constitution was adopted with little recorded debate and has undergone remarkably little revision in its 200-year history. Recapturing the meaning of a particular word or phrase as understood by a generation more than two centuries removed from our own requires, in some respects, an immersion in the culture and materials of the past more suited to the work of professional historians than courts and lawyers. The responsibility of the Court, however, is distinct from that of the historian, whose interpretation of past thought and actions necessarily informs our analysis of current issues but cannot

[83] *See id.* at 460-461.
[84] *Brigham v. State*, 166 Vt. 246 (1997).
[85] *Baker v. State*, 170 Vt. 590, 744 A.2d 864 (1999).
[86] *Id.*, 744 A.2d at 875.
[87] *Id.*, 744 A.2d at 889.

> alone resolve them. As we observed in State v. Kirchoff (1991), "our duty is to discover ... the core value that gave life to Article [7]." Out of the shifting and complicated kaleidoscope of events, social forces, and ideas that culminated in the Vermont Constitution of 1777, our task is to distill the essence, the motivating ideal of the framers. The challenge is to remain faithful to that historical ideal, while addressing contemporary issues that the framers undoubtedly could never have imagined.

In re: Handy; In re: Jolley Associates **(2000)** is the most recent judicial review decision.[88] Deep within the state's zoning laws was a provision that prohibited zoning administrators from issuing permit that were inconsistent with proposed changes in the bylaws, as long as public notice of a hearing had been posted. Exceptions to this rule were allowed by the bylaw when the selectboard approved of them. But the statute gave no standards by which the selectboard could decide who should qualify for an exemption. This statute violated Section 5 (separation of powers) and the Equal Protection and Due Process Clauses of the U. S. Constitution (Fourteenth Amendment). The law prohibited the issuance of zoning permits inconsistent with proposed bylaw amendments. The select board could allow projects to continue, however, by giving their consent. But the statute provided no standards by which that consent could be granted. Justice John Dooley wrote that the statute was unconstitutional because "it gives town selectboards unbridled discretion to decide whether to review applications under the old or new zoning bylaws, with no standards to limit the exercise of that discretion." Landowners need standards to be able to predict how discretion will be exercised.

The latest judicial review decision is ***Vermont Soc. of Ass'n Executives v. Milne*** **(2001)**, in which the Court invalidated the lobbyist tax on the grounds that it violates the First Amendment to the U. S. Constitution. The decision, written by Justice Marilyn Skoglund, concluded that lobbying is protected speech, entitled to a heightened scrutiny the legislation could not survive.

8. Conclusions:

The list does not presume to be comprehensive. Others may show up in time in places where keywords fail to find them. But take the 50 cases cited here in bold type for what they are. Fourteen cases turn on separation of powers, but then separation of powers is essentially what the Court does when it exercises judicial review, so perhaps Section 5 is involved in all of the cases.

There are seven Article 7 (common benefits) cases, seven that use the Fourteenth Amendment, five that apply Article X of the U.S. Constitution (contract clause), and two protecting the right to trial by jury (Article 9, Section 38 of the Vermont Constitution).

Judge Samuel Prentiss and Justice John Dooley each wrote four judicial review decisions, but many different judges and justices had a hand at writing the decisions. The best written, at least from a literary and inspirational perspective, are *Bates v. Kimball* (1824) and *Baker v. State* (1999). But these cases are not only literature: they are the foundation of Vermont Constitutional

[88] *In re: Handy; In re: Jolley Associates*, Nos. 98-015 and 98-016 (filed November 17, 2000).

law. Knowing them, being able to cite them with comfort, cannot help but strengthen any good constitutional argument.

What works and what does not is a subject anyone may speculate on. Certainly this a good season for Article 7 (common benefits) arguments. How far the Court will go in extending common benefits is the next most interesting question. A close look at the very pregnant Article 1 may also be valuable, in light of its use in *Town of Waterbury v. Melendy* (1938), *State v. Cadigan* (1901), and *Tyler v. Beacher* (1871). We can only wait to savor the decisions that will follow. Judicial review is a fertile field, even if it is a most delicate business.

Paul Gillies, June 27, 2001.

Appendix: Chronological List of Cases

1. Dupy qui tam v. Wickwire, 1 D. Chip. 237 (1814).

2. Starr v. Robinson, 1 D. Chip. 257 (1814).

3. Bates v. Kimball, 2 D. Chip. 77 (1824).

4. Ward v. Barnard, 1 Aik. 121 (1825).

5. Staniford v. Berry, 1 Aik. 314 (1825).

6. Bradford v. Brooks, 2 Aik. 284 (1827).

7. Lyman v. Mower, 2 Vt. 517 (1830).

8. Kendall v. Dodge, 3 Vt. 360 (1831).

9. Hill v. Town of Sutherland, 3 Vt. 507 (1831).

10. Trustees of Caledonia County Grammar School v. Burt, 11 Vt. 632 (1839).

11. Atkins v. Town of Randolph, 31 Vt. 226, (1858).

12. Plimpton v. Town of Somerset, 31 Vt. 283 (1860).

13. Opinion of the Justices, 37 Vt. 665 (1863).

14. State v. Peterson, 41 Vt. 504 (1869).

15. Kellogg v. Page, 44 Vt. 356 (1871).

16. Tyler v. Beacher, 44 Vt. 648 (1871).

17. Abbott v. Ware, Orange County, unreported (1874).

18. Barnes v. Dyer, 56 Vt. 469 (1884).

19. State v. Pratt, 59 Vt. 556 (1887).

20. Town of Strafford v. Town of Sharon, 61 Vt. 126 (1889).

21. New England Trout Club v. Mather, 68 Vt. 338 (1896).

22. State v. Hoyt, 71 Vt. 59 (1899).

23. State v. Cadigan, 73 Vt. 245 (1901).

24. In re Conditional Discharge of Convicts, 73 Vt. 414 (1901).

25. State v. Shedroi, 75 Vt. 277 (1903).

26. State v. Dodge, 76 Vt. 197 (1904).

27. State v. Abraham, 78 Vt. 53 (1905)..

28. Corliss v. Village of Richford, 85 Vt. 85 (1911).

29. In re Municipal Charters, 86 Vt. 562 (1913).

30. In re Dewar, 102 Vt. 340 (1930).

31. Waterbury v. Melendy, 109 Vt. 308 (1938).

32. In re Opinion of the Justices, 115 Vt. 524 (1949).

33. Granai v. Witters, 123 Vt. 468 (1963).

34. Mikell v. Town of Williston, 129 Vt. 586 (1971).

35. Beecham v. Leahy, 130 Vt. 164 (1972).

36. Vielleux v. Springer, 131 Vt. 33 (1973).

37. In re Eddy's Estate, 135 Vt. 468 (1977).

38. State v. Carpenter, 138 Vt. 140 (1980).

39. State v. Ludlow Supermarkets, Inc., 141 Vt. 261 (1982).

40. Kennedy v. Chittenden, 142 Vt. 397 (1983).

41. Solomon v. Atlantic Development, 145 Vt. 70 (1984).

42. Choquette v. Perrault, 153 Vt. 45 (1989).

43. Wolfe v. Yudachak., 153 Vt. 235 (1989).

44. Oxx v. Vermont Department of Taxes, 159 Vt. 371 (1992).

45. Lorrain v. Ryan, 160 Vt. 202 (1993).

46. MacCallum v. Seymour, 165 Vt. 452 (1996).

47. Brigham v. State, 166 Vt. 246 (1997).

48. Baker v. State, (1999).

49. Handy/Jolley Associates (2000).

50. Vermont Society of Association Executives v. Milne (2001).